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No. 82-877

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH C. BONANNO, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR T HE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant may be convicted of conspiracy when the overt acts proved at trial were not enumerated in the indictment.

2. Whether out-of-court utterances made by petitioner's co-conspirator were improperly introduced against petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. D1-D24) is reported at 685 F.2d 447 (table). The decision of the district court (Pet. App. C1-C25) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. D16) was entered on July 30, 1982. A petition for rehearing (Pet. App. E1-E2) was denied on October 15, 1982. The petition for a writ of certiorari was filed on November 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a bench trial in the United States District Court for the Northern District of California, petitioner was convicted of conspiring to obstruct justice, in violation

of 18 U.S.C. 371 (Count 1).[1] The court sentenced him to a term of five years' imprisonment and a $10,000 fine (C.R. 501).[2]

The evidence at trial established that petitioner conspired to influence witnesses to withhold evidence and give false testimony before a federal grand jury in San Francisco that was investigating his sons, Salvatore Bonanno and Joseph Bonanno, Jr. The investigation was begun in late June 1978 after the grand jury received information indicating that the Bonanno brothers were using their businesses to "launder" money and commit fraud (R.T. 12-13).[3]

In September 1978, the FBI recovered certain handwritten notes from petitioner's trash. Those notes, which were written by petitioner, contained references to the grand jury investigation, grand jury witnesses and potential witnesses, the records of some of the companies under investigation, and answers that certain grand jury witnesses could or

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[1]Petitioner was tried with Jack DiFilippi, who was convicted of the conspiracy and three counts of making false statements before a grand jury, in violation of 18 U.S.C. 1623 (Counts 2, 4, 5) (Pet. App. A1-A2). The court acquitted DiFilippi of two counts (Counts 3, 7) charging violations of 18 U.S.C. 1623 and dismissed another (Count 6) as duplicative of Count 5 (C.R. 132, 1-2, 9-10; Pet. App. A1-A2).

[2]"C.R." refers to the excerpt of record filed in the court of appeals. "R.T." refers to the trial transcript.

[3]Anthony Insanas testified that he was in partnership with Salvatore Bonanno in Los Gatos Construction Company and that, with the knowledge and blessing of Salvatore Bonanno, he defrauded elderly homeowners on home remodeling and repair contracts and split the fraudulently obtained money with Salvatore Bonanno (17 R.T. 279-303; 20 R.T. 35o-395; 21 R.T. 398-422; 22 R.T. 430-477).

should give before the grand jury.[4] In October, the government obtained a court order pursuant to 18 U.S.C. 2516 authorizing the interception of the conversations of petitioner and others over petitioner's home telephone. The government then intercepted several phone conversations between petitioner and co-defendant Jack DiFilippi and one conversation between petitioner and Salvatore Bonanno. These conversations were introduced at trial, together with petitioner's handwritten notes and consensually recorded conversations between petitioner and Louis Peters, a grand jury witness.

In June 1977, Peters told law enforcement officials that Salvatore Bonanno had offered to purchase his Cadillac dealership (29 R.T. 1323-1329). At the request of the FBI, Peters agreed to go along with the proposed deal and to cooperate with the FBI in its investigation of Salvatore Bonanno (29 R.T. 1329-1330). During the following months, Peters met DiFilippi, who said that he would be handling the arrangements to purchase Peters' business because Salvatore Bonanno was "tied up" (29 R.T. 1331-1334). Peters had many discussions with DiFilippi about the financing of that purchase and, later, about another business deal with Salvatore Bonanno (29 R.T. 1334-1392).

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[4]These were recovered during a "trash cover" surveillance of petitioner Bonanno in Tucson, Arizona, which agents of the Arizona Drug Control District had begun in December 1975. The agents collected petitioner's trash on mornings when it was regularly set out for collection by city sanitation workers (except on days when it was known that he was not in town) (1 R.T. 60). The trash was taken from cans that had been placed for collection approximately one foot from the curb on what petitioner stipulated was a public easement (1 R.T. 60; 2 R.T. 23-24; Pretrial Ex. No. I). The trash itself was usually in open grocery bags inside the cans, but on some occasions it was set beside the cans (2 R.T. 18-19, 47). After collecting the trash, the agents removed the notes or parts of notes from the rest of the trash; often the notes were torn, but sometimes they were not (2 R.T. 22-23).

By early February 1979, it had become apparent to Peters and the FBI that the business deals proposed by Salvatore Bonanno and DiFilippi were not nearing culmination. It was decided that Peters' part in the investigation should be ended in such a way as to avoid disclosure of his cooperation with the FBI. Accordingly, it was decided that Peters should testify before the grand jury, and on February 15, 1979, he was served with a grand jury subpoena (29 R.T. 1392-1393). Peters then telephoned petitioner and told him of the subpoena. He also informed petitioner that he had sold Salvatore Bonanno's Cadillac and had given him the proceeds in cash. Petitioner then told Peters not to reveal that sale to the grand jury and to hide any records of it (Ex. 105-2, at 2-3, 7-11, 21-26).[5] Petitioner also instructed Peters to deny that they had engaged in the conversation during which these matters were discussed (Ex. 105-2, at 17-19, 26).

2. On appeal, petitioner contended that the government had violated the First Amendment in searching and seizing the contents of his trash can. On its own motion, the court of appeals remanded the case to the district court to make "specific findings as to the basis for the court's judgment," and, in particular, "as to whether there was sufficient evidence, beyond a reasonable doubt," apart from the evidence taken from petitioner's trash can (Pet. App. B1-B2). On remand, the district court found that the remaining evidence was sufficient beyond a reasonable doubt and relied upon the evidence of petitioner's attempt to influence Peters

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[5] "Ex." refers to the government's exhibits at trial. It was apparent from the evidence at trial that petitioner Bonanno was concerned about what conclusions the grand jury would draw from certain of his son's financial dealings—particularly those involving cash. Bonanno was aware that his son's financial dealings were a major subject of inquiry during earlier proceedings in 1978 to revoke his son's probation (27 R.T. 1117-1120, 1122-1123). The Cadillac in this case was nominally owned by Salvatore Bonanno's business.

to testify falsely regarding the sale of Salvatore Bonanno's Cadillac (Pet. App. C1-C25). The court of appeals then affirmed petitioner's conviction without reaching the issue of the legality of the trash can searches (Pet. App. D1-D24).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioner contends (Pet. 18-25) that his conspiracy conviction must be reversed because his attempt to influence Peters to testify falsely was not listed in the indictment as an overt act. This argument is invalid. It has long been established that a conspiracy conviction may rest upon proof of an overt act not charged in the indictment, unless the omission affects the defendant's substantial rights. See, e.g., *Brulay* v. *United States*, 383 F.2d 345 (9th Cir.), cert. denied, 389 U.S. 986 (1967); *United States* v. *Armone*, 363 F.2d 385 (2d Cir. 1966); *Napolitano* v. *United States*, 340 F.2d 313 (1st Cir. 1965); *Culp* v. *United States*, 131 F.2d 93 (8th Cir. 1942); *Worthington* v. *United States*, 1 F.2d 154 (7th Cir.), cert. denied, 266 U.S. 626 (1924).

In the present case, petitioner does not point to any basis for concluding that he was prejudiced by the omission. On the contrary, it is clear that petitioner was not surprised at trial by the introduction of the evidence relating to his dealings with Peters. Not only did petitioner's efforts to influence Peters' testimony fall squarely within the allegation in the charging paragraph of the conspiracy count, which alleged that petitioner and DiFilippi conspired "to corruptly obstruct justice" (Pet. App. G4), but that conduct was clearly described in succeeding paragraphs alleging that the defendants had attempted to achieve the objectives of the conspiracy by endeavoring to influence grand jury witnesses to testify falsely and withhold evidence (Pet. App.

G5-G6). Moreover, the government provided petitioner with copies of the tapes and the transcript of the Peters conversations (1 R.T. 41, 144), and matters involving Peters were the subject of defendants' pretrial motions (C.R. 235, at 16; C.R. 101, at 12) and a pretrial hearing at which petitioner was present and testified (3 R.T. 271-277; 5 R.T. 107, 152-156). As the court of appeals stated, "the government repeatedly advised the trial court, beginning with the opening statement, that it was the theory of the prosecution that a conspiracy to obstruct justice could be sustained based solely on the instructions given by [petitioner and his codefendant] to Peters" regarding his grand jury testimony (Pet. App. D11; 14 R.T. 75-76, 83-86). No objection was made to the introduction of the Peters evidence on the grounds of variance. Nor did defense counsel seek a bill of particulars or claim surprise at trial (Pet. App. D11).

Petitioner's reliance upon this Court's decision in *Dunn* v. *United States*, 442 U.S. 100 (1979), is misplaced. In *Dunn*, the defendant was convicted of violating 18 U.S.C. 1623 by making two inconsistent declarations in proceedings "before or ancillary to [a] court or grand jury of the United States." The inconsistency between the two statements alleged in the indictment was the sole theory upon which the case was tried and submitted to the jury (see 442 U.S. at 106). The court of appeals affirmed, however, based upon the inconsistency between one of those statements and a third declaration. This Court reversed, holding (as the government conceded) that the defendant could not be convicted "on a charge that was neither alleged in [the] indictment nor presented to [the] jury at trial" (*ibid.*).

In the present case, petitioner's conviction was affirmed on the basis of the charge alleged in the indictment and proved at trial: conspiring with DiFilippi and others at a

particular place and time to obstruct justice.[6] The essence of a conspiracy is the illegal agreement (see *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975)), not the overt acts committed in furtherance of it. An overt act need not be criminal and may in itself be entirely innocent. See, e.g., *United States* v. *Andreen*, 628 F.2d 1236, 1248 (9th Cir. 1980); *United States* v. *Donahue*, 539 F.2d 1131, 1136 (8th Cir. 1976). Nor need the government prove that each conspirator committed an overt act in order to convict; it must show only that one overt act was committed by one conspirator. *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). A conspiracy indictment need not enumerate every overt act, and the government may prove overt acts not listed in the indictment. See, e.g., *United States* v. *Johnson*, 575 F.2d 1347, 1357 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979); *United States* v. *Harris*, 542 F.2d 1283, 1300 (7th Cir. 1976), cert. denied, 430 U.S. 934 (1977); *United States* v. *Cohen*, 518 F.2d 727, 733 (2d Cir.), cert. denied, 423 U.S. 926 (1975). *United States* v. *Quesada*, 512 F.2d 1043, 1046 (5th Cir.) cert. denied, 423 U.S. 946 (1975). Likewise, the government is not required to prove all overt acts listed in the indictment. See, e.g., *United States* v. *Parker*, 586 F.2d 1253, 1258 (8th Cir. 1978); *United States* v. *Adamo*, 534 F.2d 31, 38 (3d Cir.), cert. denied, 429 U.S. 841 (1976). And, as previously noted (see page 5, *supra*), the courts of appeals have consistently held that a conspiracy conviction may be based upon an overt act not enumerated in the indictment. Thus, affirming a conspiracy conviction on the basis of an overt act proven at trial but not alleged in the indictment is entirely different from "uphold[ing] a conviction on a

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[6]Certainly petitioner was not convicted on the basis of a charge not presented to the trier of fact, since the trial judge in this case explicitly stated he had found petitioner guilty of conspiracy to obstruct justice based on the Peters evidence (Pet. App. A7-A11; C1-C25).

charge that was neither alleged in [the] indictment nor presented to [the] jury at trial" (*Dunn* v. *United States*, *supra*, 442 U.S. at 106).[7]

2. Petitioner also asserts (Pet. 25-30) that DiFilippi's statements were improperly admitted against him as co-conspirator declarations (Fed. R. Evid. 801(d)(2)(E)) because the government failed to introduce sufficient independent evidence to prove the existence of the conspiracy. The court of appeals correctly concluded (Pet. App. D15), however, that petitioner's own statements during those conversations were admissible as admissions (Fed. R. Evid. 801(d)(2)) and provided sufficient independent evidence of the conspiracy. This factual conclusion was correct and in any event does not warrant further review by this Court.

In a conversation recorded on February 15, 1979, Peters informed petitioner that he had received a grand jury subpoena and that he was concerned about testifying regarding the cash sale of Salvatore Bonanno's Cadillac. Petitioner

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[7]Petitioner appears to advance several other claims related to his contention that his conviction could not properly be affirmed on the basis of an overt act not charged in the indictment, but those claims are clearly without merit. Petitioner states (Pet. 20) that "the Ninth Circuit remanded the case for what amounted to a new, summary trial upon an old record" and that at this "retrial" he was denied "the right to prepare his defense, confront the witnesses against him, and have his case tried before an impartial trier of facts" (Pet. 25). However, petitioner was afforded all those rights at trial and no new evidence was introduced on remand. The court of appeals merely remanded so that the district court could make specific findings as to the basis for the court's original judgment.

Petitioner also suggests (Pet. 20 & n. 19) that the court of appeals was required to decide whether the government violated his First Amendment rights by removing his torn-up handwritten notes from the trash and assembling them. However, resolution of that question was not necessary in order to decide petitioner's appeal.

instructed Peters not to give the grand jury the records concerning that sale and not to reveal their conversations to anyone (Pet. App. C2-C12). Petitioner asserts (Pet. 28) that the only legitimate inference that may be drawn from this evidence is that he acted alone in seeking to induce Peters to withhold evidence. However, the following additional evidence permitted the district court to infer that petitioner and DiFilippi were acting in concert: (1) a few days after Peters spoke with petitioner, DiFilippi also sought to have Peters withhold evidence regarding the cash sale of the car and assisted Peters in hiding the records of the sale (Pet. App. C12-C22);[8] (2) Peters had not told DiFilippi about his February 15 conversation with Bonanno (Ex. 108-111, 12-13; Pet. App. C12). It was therefore reasonable for the district court to infer, as it did (Pet. App. A8-A10, C21-C22), that petitioner and DiFilippi had conferred about the implications of Peters' subpoena and his potential grand jury testimony and had agreed that they should attempt to have Peters withhold information about the cash sale of petitioner's son's car.

Moreover, it is apparent that none of the utterances of DiFilippi upon which the court of appeals relied in sustaining petitioner's conviction was "offered in evidence to prove the truth of the matter asserted" (Fed. R. Evid. 801(c)) and thus none was hearsay. The court of appeals relied upon the following two statements made by DeFilippi (Pet. App. D14; emphasis added):

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[8]DiFilippi's instructions for Peters to withhold evidence (see Pet. App. D14) were introduced simply to prove that they were given and not "to prove the truth of [any] matter asserted" (Fed. Rev. Evid. 801(c)). Thus, they were not hearsay, as petitioner maintains (Pet. 29 & n.23), and could be used to establish the predicate for the admission of co-conspirator statements.

5. The taped conversation between DiFilippi and Peters on February 27, 1979, indicates that *DiFilippi directed Peters to put documents relating to the sale of Bill Bonanno's Cadillac in a "place where nobody thinks that it would be."* Ex. 112-1 at 23.

* * * * *

7. The taped conversation between DiFilippi and Peters on March 21, 1979 shows that *DiFilippi suggested Peters give inaccurate responses to the grand jury if questioned about any conversation Peters had with Bonanno.*

These commands were obviously introduced simply to show that they were made and not to prove the truth of any matter asserted. Indeed it is difficult to read them as asserting the truth of anything.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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